



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: PDL: RHap1836510

10 March 2020

Ms Margery Nicoll
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Dear Ms Nicoll,

Consultation on the Australian Human Rights Commission's Human Rights and Technology Report

Thank you for the opportunity to provide input to a Law Council of Australia submission to the second phase of the Australian Human Rights Commission's ("AHRC") consultation on Human Rights and Technology. The Law Society of New South Wales' Privacy and Data Law Committee and Human Rights Committee have contributed to this submission.

In addition to our previous submission to you of September 2018 during the first phase of the AHRC's consultation, our position on various AHRC proposals is outlined below.

Proposal 1: The Australian Government should develop a National Strategy on New and Emerging Technologies

The Law Society supports this proposal. We consider there is a need for greater government oversight of new and emerging technologies at both the State and Federal level and support appropriately targeted and balanced regulation of uses of new and emerging technologies by both the public and private sectors.

In response to the questions posed at paragraph 3.5 (a), we recommend the proposal for a National Strategy on New and Emerging Technologies should consider whether a new legislative framework would assist in promoting the full suite of rights engaged by new and emerging technologies. In this regard, and as the AHRC has identified in response to the initial AHRC Issues Paper, a number of stakeholders identified the lack of a federal human rights act as a significant gap in Australia's regulatory and governance framework for human rights protection in relation to new technologies.¹ We would support further exploration of the impact of this legislative gap and mechanisms for addressing it.

¹ Australian Human Rights Commission, *Human Rights and Technology: Discussion Paper* (2019) 42.

The Law Society agrees that the AHRC's proposal for development of a National Strategy, which protects and promotes human rights of all people, and especially vulnerable and disadvantaged groups, is critical to building enduring public trust in those technologies.

With respect to public sector agencies, we note that properly considered and managed implementations of new and emerging technologies, including advanced data analytics and artificial intelligence ("AI"), have demonstrated capability to reduce the cost of delivering government services, to enable services to be better targeted to areas of greatest need, and to improve citizens' interactions with government agencies.

In the private sector, uses of new and emerging technologies present opportunities for a range of benefits, including the potential to develop new products, access new markets, improve the economy, work more efficiently, better target consumer preferences, and deliver safer working environments.

While we wish to see these benefits realised, it will be important to address the real anxieties over, and legal issues associated with, new uses of data and technology by both the government and private sector. We recognise the range of concerns citizens have over use of such products, which are often fuelled by exogenous factors such as stakeholder and citizen anxiety over opaque data sharing between diverse government agencies, excessive surveillance, Cambridge Analytica-style inappropriate uses of data, and the shortcomings of privacy and discrimination laws in addressing differential treatment of individuals (whether or not identifiable) in applications of algorithmically assisted decision-making.

We consider the engagement of all stakeholders, including civil society organisations and citizens, in developing a national strategy will be a critical step to ensuring that digital trust and social licence are nurtured in areas as sensitive as novel applications of data and AI by government and 'big tech' companies.

We therefore recommend the AHRC consider building a recommendation around community consultation and citizen onboarding into its proposal to government for development of a national strategy.

By way of positive example, we note the New Zealand Government's Data Futures Partnership initiative, which empowered dialogue between citizens and interested stakeholders through knowledge building, crafted explanatory materials and white papers, followed by town hall-style consultations.

We also commend the initiatives of the Office of the Interim National Data Commissioner in consulting, through boardroom table-style discussions, with interested citizens and other stakeholders on development of legislation for government data sharing. These consultations enabled interested parties to actively participate in the shaping of broad policy proposals into drafting instructions for specific legislative provisions. The consultations were conducted in a way that built the capacity of interested parties to constructively (both positively and negatively) contribute to that important drafting process. We note that the Office of the Interim National Data Commissioner amended a number of drafting proposals in response to suggestions made in these fora.

We note that it may be difficult, however, to engage citizens on human rights as an abstract topic, even when translated into specific examples of applications of technologies that can be demonstrated to impact commonly understood fundamental

rights such as freedom of expression of political communication. We therefore recommend that any citizen engagement include examples of the various methodologies and processes that government and businesses might use to evaluate any adverse impacts of particular applications of technology. We note in this regard that many citizens are now familiar with the process of environmental impact assessments (EIAs) and reporting. In particular, citizens are more familiar with how EIAs address abstract and contentious concerns and are iterative, informed, structured, multi-faceted and multi-party. Many citizens understand that impact assessments form a process that must be followed when certain risk thresholds are met, and that they contribute to a report which aids decision-making by presenting various perspectives and ultimately, conclusions which weigh and mitigate risks against demonstrated benefits.

We recommend the AHRC consider including examples of already developed processes in its recommendations to government, and that any recommendations promote development of a strategy which focuses on how rights-affecting applications of technologies are assessed. We consider such an approach to the development of a framework would be more effective than simply stating principles and guidelines which may not build public trust or have practical traction in the decision-making processes of government agencies and businesses.

Proposal 2: The Australian Government should commission an appropriate independent body to inquire into ethical frameworks for new and emerging technologies

As the AHRC has identified, there are various initiatives currently underway by government, semi-government and private entities, including various health departments, the Australian Government Digital Transformation Agency and Department of Industry, Innovation and Science, on the ethical and regulatory issues that arise in relation to AI. The Law Society supports the commission of a single, independent body to inquire into how existing and proposed ethical, rights, and social impact frameworks address (or can be adapted to address) new and emerging technologies, and to collate the findings of these various initiatives.

We recommend any independent body commissioned to conduct such an inquiry convene a multi-disciplinary group that includes project planning and management experts (well experienced in the application of standards, project management methodologies and business planning), privacy, rights, social impact and ethics specialists and lawyers. Such a group would provide depth to specialist areas and would greatly benefit the development of an ethics framework for new and emerging technology.

We note new and emerging technology, including AI, has a global impact and the use of such products is not limited by national borders. Global opportunities require a global solution. We consider that international collaboration on appropriate standards should therefore also be encouraged. Various international standards organisations are evaluating global standards for AI. Standards are usually developed through committees of experts and relevant stakeholders. The joint committee of the ISO and IEC (Joint Technical Committee 1) for example, can enlist countries to collaborate on international standards.² Given the range of international initiatives, we consider that, once consensus is reached on an approach in Australia, Australia should take a more active role and partner with like-minded international organisations to develop a

² <<https://www.iso.org/isoiec-jtc-1.html>>.

shared approach to AI development and the embedding of a high standard of privacy and ethical principles in AI design.

Artificial Intelligence

Proposal 3: The Australian Government should engage the Australian Law Reform Commission to conduct an inquiry into the accountability of AI-informed decision making, specifically addressing AI and the principle of legality, rule of law and promotion of Human Rights.

The Law Society supports this proposal. However, we note the time that will be required for the Australian Law Reform Commission (ALRC) to properly conduct such an inquiry.

Noting the urgent need to address the numerous issues associated with this unregulated nascent area, we recommend that any recommendation to government for such a referral include guidance as to timing, including in relation to the publication of interim reports and associated government responses.

Proposal 4: The Australian Government should introduce a statutory cause of action for serious invasion of privacy.

The Law Society supports this recommendation. We consider that laws protecting individuals against breach of privacy have not kept pace with technological developments. New technologies, such as those that enable corporations and governments to establish detailed profiles of individuals based on their personal data and browsing history, present an unprecedented scope for serious invasions of privacy.

The right to privacy is recognised as a fundamental human right in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC) and other instruments and treaties. Australia's obligations under the ICCPR and CRC – which Australia ratified in 1980 and 1990 respectively – require enhanced protections against breach of privacy, to protect against incursions of privacy enabled by new technologies.

In particular, and in line with the ALRC's recommendation from 2014, we consider a new tort should cover two types of invasion of privacy: intrusion upon seclusion; and misuse of private information.³ As the ALRC has recommended, the design of legal privacy protection should be 'sufficiently flexible to adapt to rapidly changing technologies and capabilities, without needing constant amendments'.⁴ This recommendation is particularly salient in light of the exponential pace at which new technologies such as AI and blockchain are developing, and the evolving scope of their application.

We would also support such legislation at the State level.

³ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123 (2014), 9.

⁴ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123 (2014), 36.

Proposal 5: The Australian Government should introduce legislation to require that an individual is informed where AI is materially used in a decision that has a legal, or similarly significant, effect on the individual's rights

The Law Society supports this proposal for the reasons the AHRC has articulated.

We also note that one of the biggest challenges to protecting privacy in the development or application of AI (broadly defined to include any form of machine automation assisted or enabled decision-making by humans as well as fully autonomous systems) is the use and disclosure of information as activities, interests or preferences of particular individuals or households (whether or not identifiable) for secondary purposes.

Often, personal information about an individual collected for a different primary purpose is able to be re-used in AI to inform how a particular individual or household will be dealt with, in circumstances where because an individual is not identifiable to the operator of the AI system, the secondary use is not a regulated secondary use of personal information about an (identifiable) individual. Data and technology enable decision-makers to use information about particular (but not identified or identifiable) individuals or households and to make decisions about how an individual or household is treated without the affected individual or household knowing that this 'deidentified information' has been collected, used and disclosed in this way, with potential adverse consequences to their rights and interests.

Even where an individual is identifiable and the relevant secondary use is therefore regulated under privacy law, issues often arise as to the adequacy of notice and consent, and in particular, whether purported consent is informed, understood, explicit and current.

The Law Society recommends that the risks of reliance on notice and consent, and the existing scope of privacy laws in the AI context, should be considered and protections built in to any new legislation.

We note Privacy Impact Assessments may be a means by which the privacy impacts of AI can be assessed so that strategies for mitigating risks can be developed to ensure that privacy is protected before information is collected and used. These assessments could be expanded to include rights and social impact assessment, although consideration would also need to be given to expanding the range of input and evaluative skills required to properly inform such a broadened and multi-faceted assessment. Safeguards such as data minimisation and purpose limitation should also be implemented to prevent the unauthorised collection, use and disclosure of personal information. Individuals should also be able to seek access to their personal information that has been used or generated in the AI system and seek redress if they have been detrimentally affected by a decision made by the AI system.

We note in the European Union, Article 22 of the General Data Protection Regulation ("GDPR") contains rules to protect individuals in the context of automated decision-making with a legal or otherwise significant effect on them. The Law Society is of the view that provisions in the GDPR protecting individual rights in the face of AI-informed decision-making, as well as regulating the type of data that can be used, are a useful benchmark for how these issues might be approached.

Proposal 7: The Australian Government should introduce legislation regarding the explainability of AI-informed decision making.

The Law Society supports this proposal. We consider organisations that use AI should be required to make available to individuals descriptions of an algorithm's functionality where concerns about infringements to their rights arise or where such information is necessary to facilitate achieving natural justice in a decision-making process.

While we acknowledge there may be arguments against this from the perspective of protecting intellectual property or commercial interests, these considerations need to be weighed against freedom of information considerations, transparency and principles of democratic governance. We note that algorithms may be explained without compromising any trade secret character of the underlying algorithm itself, and that commercial interest should not be a reason to deny an individual access to an appropriate and reasonable explanation of how algorithms have been used to affect how an organisation (both government agencies and private sector organisations) deals with that individual.

Proposal 10: The Australian Government should introduce legislation that creates a rebuttable presumption that the legal person who deploys an AI-informed decision-making system is accountable and legally liable for the use of the system.

The Law Society supports this proposal.

In addition, we note there is a developing trend to mandating human intervention in all cases where an individual might receive a negative decision from an AI-enabled system. For example, GDPR Article 22(3) provides that, in such circumstances, a data subject has 'the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision'.

We do not consider that mandating inclusion of a human-in-the-loop of itself effects a solution: a human may or may not make a sensible and balanced evaluation of machine outputs. We consider that it is sensible to require agencies and businesses deploying AI systems to be accountable for their use of those systems. Such businesses and agencies may (and should) contract with systems suppliers to ensure that appropriate transparency and reliability are built into such systems. Businesses and agencies may (and should) also implement an internal process for evaluating inputs into and outputs of those systems to ensure outputs are only relied on by humans where it is sensible to do so: for example, where the machine will demonstrably and reliably outperform a properly informed human in relation to a particular class of decisions, and there is appropriate review and oversight.

We recommend a clear right of recourse against decisions made by AI be available in Australia. We also consider the Government should focus on providing the right of legal entities, including natural persons, to a cost-effective and timely review of decisions made by AI-based systems.

Proposal 11:

The Australian Government should introduce a legal moratorium on the use of facial recognition technology in decision making that has a legal, or similarly significant, effect for individuals, until an appropriate legal framework has been put in place. This legal framework should include robust protections for human rights and should be developed in consultation with expert bodies including the Australian Human Rights Commission and the Office of the Australian Information Commissioner.

The concerns outlined in Chapter 6 of the AHRC Discussion Paper in relation to the human rights implications of facial recognition technology are well-founded. As Bruce Schneier, an Adjunct Lecturer at the Harvard Kennedy School has noted, however, facial recognition is 'just one identification technology among many'.⁵

A moratorium on the use of facial recognition technology will have no effect if, in response, governments and organisations deploy other biometric identification technologies instead, such as gait recognition,⁶ heartbeat detection,⁷ voice recognition or fingerprint scanning. To guard against this possibility, and 'future proof' the AHRC's final report on Human Rights and Technology, we suggest that any recommendations on this issue refer more broadly to 'biometric identification technologies', rather than only 'facial recognition technology'.

Thank you for the opportunity to provide input on this Discussion Paper. Should you have any questions or require further information please contact Adi Prigan, Policy Lawyer, on (02) 9926 0285 or email Adi.Prigan@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President

⁵ Bruce Schneier, 'We're banning facial recognition. We're missing the point', *The New York Times* (online), 20 January 2020 < <https://www.nytimes.com/2020/01/20/opinion/facial-recognition-ban-privacy.html>>.

⁶ Australian Law Reform Commission, *For Your Information: Privacy Law and Practice* (Report 108, May 2008), 406 [9.64].

⁷ David Hambling, 'The Pentagon has a laser that can identify people from a distance—by their heartbeat', *MIT Technology Review* (online), 27 June 2019 <<https://www.technologyreview.com/s/613891/the-pentagon-has-a-laser-that-can-identify-people-from-a-distance-by-their-heartbeat/>>.